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No. 02-

IN THE

Supreme Court of the United States

PATRICIA C. ANDERSON, MICHAEL A. HOSEIN, AND STEPHEN E. PARKER,

Petitioners,

v.

ALEXANDER F. TREADWELL, AS SECRETARY OF STATE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a content-based restriction on truthful, non-misleading commercial speech is subject to strict scrutiny where, as here, that restriction is not intended to prevent commercial harms or otherwise protect a fair bargaining process.

2. Whether a law authorizing the resident-activated restriction of truthful, non-misleading commercial speech is constitutional under the Central Hudson test where, as here, the restriction is both substantially underinclusive and content-based.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR CERTIORARI

Petitioners, Patricia Anderson, Michael A. Hosein, and Stephen Parker, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-17a) was entered on June 25, 2002, and is reported at 294 F.3d 453 (2d Cir. 2002). The opinion of the United States District Court for the Eastern District of New York (App. 20a-26a) was entered on June 20, 2001, and is not reported.

JURISDICTION

The court of appeals entered its opinion and judgment on June 25, 2002. On September 17, 2002, Justice Ginsburg granted petitioners' application for an extension of time to file their petition for certiorari until October 23, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

New York Real Property Law § 442-h(3) provides:

> If the secretary of state determines that some owners of residential real property within a defined geographic area are subject to intense and repeated solicitation by real estate brokers and salespersons to place their

property for sale with such real estate brokers or salespersons, or are subject to intense and repeated solicitation by other persons regularly engaged in the trade or business of buying and selling real estate to sell their real estate, the secretary of state may adopt a rule establishing a cease and desist zone, which zone shall be bounded or otherwise specifically defined in the rule. After the secretary of state has established a cease and desist zone, the owners of residential real property located within the zone may file an owner's statement with the secretary of state expressing their wish not to be solicited by real estate brokers, salespersons or other persons regularly engaged in the trade or business of buying and selling real estate. The form and content of the statement shall be prescribed by the secretary of state. After a cease and desist zone has been established by the secretary of state, no real estate broker, salesperson or other person regularly engaged in the trade or business of buying and selling real estate shall solicit a listing from any owner who has filed a statement with the secretary of state if such owner's name appears on the current cease and desist list prepared by the secretary of state. The prohibition on solicitation shall apply to direct forms of solicitation such as the use of the telephone, the mail, personal contact and other forms of direct solicitation as may be specified by the secretary of state.

INTRODUCTION

New York Real Property Law 442-h(3) authorizes the Secretary of State of New York to establish cease-and-desist zones within which owners of residential property may inform the State that they do not wish to receive real estate solicitations. The law establishes a separate mechanism to punish real estate brokers and agents who solicit such residents by mail, telephone, or in-person. This restriction on

the freedom to engage in truthful, non-deceptive communication is strictly limited to real estate professionals. Thus, long distance carriers, stockbrokers, insurance salespersons and all other solicitors remain completely unrestricted in their solicitation efforts.

Petitioners challenged the constitutionality of this law on grounds (a) that it is a content-based restriction of truthful, non-misleading commercial speech and (b) that it is concededly underinclusive because it serves a general government interest (here, privacy) by prohibiting only speech of disapproved content by certain speakers. Petitioners asserted that the law should receive strict judicial scrutiny and, in the alternative, that the State failed to establish a "close fit" between the law and its purpose, as required under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980).

The Second Circuit rejected petitioners' assertion that the law is subject to strict scrutiny. Relying exclusively on the State's interest in protecting residential privacy, the court of appeals held that strict scrutiny does not apply to a content-based restriction on truthful, non-misleading commercial speech. Under the court's approach, strict scrutiny does not apply even when a restriction purports to serve a government purpose that is unrelated to commercial harms (such as fraud or deception) and that is far broader than the scope of the restriction. That holding is in significant tension with recent decisions of this Court which indicate that strict scrutiny should apply in such circumstances. See, *e.g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501 (1996); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992).

At a minimum, the holding reflects continuing confusion in the federal courts about the standard of judicial scrutiny applicable to laws imposing content-based restrictions on truthful, non-misleading commercial speech "for reasons unrelated to the preservation of a fair bargaining process" or the prevention of "commercial harms." *44 Liquormart*, 517

U.S. at 501. Lower courts are uncertain whether this Court's decisions require strict or intermediate scrutiny in such cases. App. 8a-9a. This case is an excellent vehicle for clarification of the substantial, persistent question whether strict scrutiny applies to content-based restrictions on truthful, non-deceptive commercial speech.

The Second Circuit also held that section 442-h(3) survives intermediate scrutiny under *Central Hudson*. The law is concededly underinclusive – that is, it bars only real estate solicitations without addressing the identical impact on privacy caused by solicitations from, *inter alia*, long distance carriers, stockbrokers, or insurance salespersons. In addition, content-neutral alternatives that fully serve the State's interest are available (*e.g.*, authorizing residents to elect not to be solicited by any person). The Second Circuit nonetheless concluded that there is a "reasonable fit" between the law and the State interest in protecting residential privacy. It read this Court's decisions as approving underinclusive, content-based restrictions on truthful speech, as long as that speech is commercial. App. 12a-14a.

This holding conflicts with decisions of this Court, most notably *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993). It is also irreconcilable with the decision of the Seventh Circuit in *Pearson* v. *Edgar*, 153 F.3d 397 (7th Cir. 1998). There, the Seventh Circuit struck down a state law authorizing residents to elect not to receive real estate solicitations, precisely because it was an underinclusive, content-based restriction on truthful, non-misleading speech. This Court should grant the petition to resolve the important and recurring question whether an underinclusive, content-based restriction satisfies *Central Hudson*'s requirement that restrictions on truthful speech must be narrowly tailored to address an important state interest.

Finally, in holding that there is a reasonable fit between New York's underinclusive, content-based law and its purpose, the Second Circuit relied heavily on the fact that the

restriction is "the kind of resident-activated restriction that was endorsed by" this Court. App. 12a. In fact, this holding cannot be reconciled with the decisions of this Court relied upon by the court of appeals. In *Rowan* v. *United States Post Office Department*, 397 U.S. 728 (1970), *Watchtower Bible & Tract Society* v. *Village of Stratton*, 122 S. Ct. 2080 (2002), and *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), this Court took great pains to make clear that it was approving resident-activated restrictions on speech that were *content-neutral*. Content-based restrictions, in contrast, are "presumptively invalid." *R.A.V.*, 505 U.S. at 382. In addition, the decision conflicts with the Seventh Circuit's decision in *Pearson* and with other decisions recognizing the central significance of content-neutrality when the government establishes a resident-activated mechanism. See 153 F.3d at 405; cases cited *infra* at 27-29.

State regulators are increasingly turning to resident-activated mechanisms to prevent telephone, mail and in-person solicitations. Resident-activation, however, should not be a tool to circumvent the First Amendment and to allow the government to do indirectly what it may not do directly. Here, the State decided that speech with a disfavored content should be subject to prohibition. This Court therefore should make clear that a State may not indirectly "handicap the expression of particular ideas," by employing a resident-activated restriction applicable only to speech with a particular content. *R.A.V.*, 505 U.S. at 394.

STATEMENT OF THE CASE

In 1969, New York outlawed "blockbusting" – "the practice of soliciting real estate sales and listings by representing that a change in the racial, ethnic or religious, character of a block, neighborhood, or area is underway." App. 2a (citing N.Y. Human Rights Law § 296(3-b)). In 1989, the New York legislature enacted Real Property Law § 442-h, a second law intended to address blockbusting.

Subsection 442-h(3) authorizes New York's Secretary of State, after finding a pattern of intense and repeated solicitation within a defined geographic area, to establish a "cease and desist" zone. N.Y. Real Prop. § 442-h(3).[1] Within such a zone, real estate licensees are forbidden directly to solicit homeowners who have registered with the Secretary, indicating that they do not wish to receive such solicitations. Regulations promulgated pursuant to subsection 442-h define solicitation as "an attempt to purchase or rent or an attempt to obtain a listing of property for sale, for rent or for purchase," and prohibit "use of the telephone, mails, delivery services, personal contact or otherwise causing any solicitation, oral or written" to be left for a property owner or at the owner's residence. N.Y. Comp. Codes R. & Regs. tit. 19, § 175.17(d)(1), *quoted at* App. 5a. Only real estate solicitations are prohibited.

The regulations currently establish five cease-and-desist zones. *Id.* § 175.17(c)(2). "[A]pproximately 20,000 homeowners are on the cease-and-desist list." App. 5a. With respect to these homeowners, as well as anyone else at their one, two, or three family homes (see N.Y. Comp. Code R. & Regs., tit. 19, § 175.17(d)(1)(i), (ii)(e)), the Secretary determines whether a communication is a solicitation by "investigating the content of the communication and the intent of the licensee in sending the communication." App. 5a-6a. "The regulation has been applied broadly to prohibit

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[1] Subsection 442-h(2) authorized the Secretary of State to find that a defined geographic area is subject to blockbusting and to adopt a "nonsolicitation order," forbidding all solicitations of residential real estate listings within that zone. In 1991, the Second Circuit held that that subsection 442-h(2) violates the First Amendment. *See New York State Ass'n of Realtors* v. *Shaffer*, 27 F.3d 834 (2d Cir. 1994). The court held that the Secretary failed to provide evidence of the harm that was alleged to justify the restriction – *viz.*, blockbusting. *Id.* at 842-44. Thus, the court found no "reasonable fit" between the degree of harm and the scope of the restriction. *Id.* at 844.

most communications by licensees to residents located at homes on the cease-and-desist list, and licensees have been found to have violated the regulations by distributing business cards, or having promotional advertisements in mass distributed coupon packs that arrive at homes on the cease-and-desist list." *Id.* at 6a. Significantly, therefore, as a practical matter, the law also prohibits solicitations of residents who have not filed a statement.

Petitioners are real estate professionals licensed by the Department of State. They do business in "areas that have been designated cease-and-desist zones." App. 6a. Petitioners Hosein and Anderson were charged with a disciplinary violation because Hosein mailed a flier to an addressee on the cease-and-desist list for Queen's County. "The flier introduced Hosein to potential clients, and detailed some of the services provided by his company." *Id.* The flier included the following: "If you have considered selling or buying a home now or in the near future, or simply want to find out what your home is worth in today's market, don't hesitate to call." *Id.* This flyer would be lawful in all other parts of New York. *Id.* at 9a. For this communication, however, Hosein and Anderson were charged with violating § 442-h(3) and its implementing regulations, and each paid a $300 fine. *Id.* at 7a. Parker also brought suit as a new sales agent, who has had particular difficulty developing his business as a result of § 442-h(3) and who reasonably fears prosecution for violations the law. *Id.* at 6a.

Invoking 42 U.S.C. § 1983, petitioners filed suit in the Eastern District of New York in February 1999. They alleged that the state law violated their constitutional right to freedom of speech. On cross-motions for summary judgment, the district court granted petitioners' motion. It held that subsection 442-h(3) and the regulations implementing it are unconstitutional. App. 26a.

The district court first held that subsection 442-h(3) is a content-based restriction on speech and therefore that strict

scrutiny applies. App. 22a-23a. It found that the State's interest in protecting homeowner privacy is compelling, but held that the restriction on speech does not "'reasonably fit' with the problem it seeks to address." *Id.* at 23a (citing *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980)). The court concluded that the content-based restriction was "underinclusive" because it singled out real estate solicitation and did not proscribe solicitation by other commercial or non-commercial solicitors. *Id.* at 24a.

The court expressly ruled that the State had "not made a showing that solicitation by realtors causes greater harm to homeowners' privacy interests than do other forms of commercial speech that broadcast through like media sources."[2] App. 25a. See *id.* ("it remains unclear how a statute proscribing solicitation by realtors only would accomplish the desired objective of safeguarding homeowner privacy"). Finally, the court concluded that the State had failed to carry its burden of showing that less restrictive, content-neutral solutions were unavailable. *Id.* The district court did not address the State's argument that the provision furthered its interest in preventing blockbusting or petitioners' counter-argument that the evidence of blockbusting was even scantier than in *Shaffer*, 27 F.3d at 842.

The Second Circuit reversed. It acknowledged that petitioners' speech is "lawful and not misleading," App. 9a, and that the restrictions imposed by the law are content-based, *id.* at 9a, 13a. Nonetheless, it held that *Central Hudson*'s intermediate level of scrutiny applies. The Second Circuit cited decisions of this Court that raise serious questions about whether the *Central Hudson* standard applies to truthful, non-

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[2] This and other references in the decision to "realtors" were apparently intended to encompass all real estate licensees. The term "REALTOR," however, is a registered, collective membership mark of the National Association of Realtors. Properly used, the term "REALTOR" applies only to those real estate licensees who are members of the Association.

deceptive commercial speech, especially when the reasons for the restriction are unrelated to the preservation of a fair bargaining process. *Id.* at 8a-9a. It observed, however, that this Court has never expressly held that the *Central Hudson* test does not apply to content-based restrictions on truthful, non-deceptive commercial speech because in each case, this Court invalidated the state statute at issue by applying intermediate scrutiny. *Id.* at 9a. Thus, the Second Circuit declined to apply strict scrutiny in this case.

The court then applied *Central Hudson's* framework for considering whether restrictions on commercial speech are constitutional. First, the court assessed the State's justifications for restricting petitioners' lawful, non-misleading speech. App. 9a. The State claimed that the restrictions were justified by its substantial interests in protecting homeowner privacy and in preventing blockbusting. As noted *supra* note 1, however, in *Shaffer*, the Second Circuit had deemed the evidence of blockbusting inadequate to support a real estate solicitation ban in designated areas. In this case, based on a similar record, the court declined to determine whether the speech restrictions could be justified by the State's interest in preventing blockbusting. App. 10a.[3] Instead, the court held that the

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[3] In *Shaffer*, the court held that "the failure of the Secretary to provide direct and concrete evidence that the evil that the restriction purportedly aims to eliminate does, in fact, exist will doom the nonsolicitation regulation under *Central Hudson*." 27 F.3d at 842. Petitioners showed that here, as in *Shaffer*, *id.* at 843, the Secretary had not done follow-up investigations of blockbusting allegations or produced empirical evidence of declining property values or churning. The Secretary has prosecuted only a single case of blockbusting against a New York real estate professional in 20 years and did not even mention blockbusting in the 1999 rulemakings re-adopting cease-and-desist zones for Queens and certain Nassau and Bronx County communities. J.A. 363-67, 271-75, 276-81, 282-86, 121. On this record, it is not surprising that neither lower court relied on the State's interest in preventing blockbusting to justify the speech abridgement at issue.

State's interest in protecting residential privacy is substantial and, by itself, justifies the State's content-based restriction on speech. *Id.*

The court recognized that the State has the burden of demonstrating that there is "a reasonable fit between the legislature's ends and the means chosen to accomplish those ends." App. 11a (citing *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 556 (2002)). However, it found such a fit here. Specifically, the court held that "the harm to homeowners' privacy from real estate solicitations is real, and that the cease-and-desist zones advance that interest directly and to a material degree." App. 12a. The court also concluded that the fit between the goal (protecting homeowner privacy) and the means (prohibiting all real estate solicitation but no other solicitation) was reasonable. Rejecting petitioners' argument that the State had singled out real estate solicitation for unfavorable treatment based on its content, the court found that a law that authorized residents to prohibit *only* real estate solicitation is analogous to laws approved by this Court. *Id.* (citing *Watchtower Bible*, 122 S.Ct. at 2091; *Rowan*, 397 U.S. at 737; *Playboy Entm't Group*, 529 U.S. at 815).

Finally, the court held that "underinclusiveness will not necessarily defeat a claim that a state interest has been materially advanced," App. 13a. In so doing, the court relied in part on the analysis in *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 478 U.S. 328, 342-43 (1986), without noting that this Court has discredited that analysis.[4] The court also distinguished *Discovery Network*, 507 U.S. at 418, on the ground that "the restriction applies only to those seeking insulation from [real estate] solicitations, and [thus] the Plaintiffs' objection relies on the distinction *among* categories

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[4] *See 44 Liquormart*, 517 U.S. at 509 ("[t]he reasoning in *Posadas* does support the State's argument, but, on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis").

of commercial solicitations, not between commercial and non-commercial solicitations." App. 15a.

The court concluded that the record contained sufficient evidence of harassing residential real estate solicitation to warrant the content-based restriction on truthful, non-misleading speech contained in subsection 442-h(3). Thus, despite the State's failure to demonstrate that real estate solicitation has a different impact on privacy than other commercial solicitation, the court held that the law does not violate the Constitution.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN SUBSTANTIAL TENSION WITH DECISIONS OF THIS COURT AND RAISES THE IMPORTANT, RECURRING QUESTION OF THE APPLICATION OF *CENTRAL HUDSON* TO CONTENT-BASED RESTRICTIONS ON TRUTHFUL, NON-MISLEADING COMMERCIAL SPEECH.

In recent cases, individual justices, and on occasion a majority of this Court, have stated the position that *Central Hudson* should *not* apply to content-based restrictions on truthful, non-misleading commercial speech. At a minimum, a majority of justices has expressed the view that strict scrutiny should apply when the purpose of the law is unrelated either to the prevention of commercial harms, such as fraud and deception, or to the protection of a fair bargaining process. See, *e.g.*, *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 184 (1999) (Stevens, J.); *id.* at 197 (Thomas, J., concurring in judgment); *44 Liquormart*, 517 U.S. at 501, 510-14 (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and in judgment); *id.* at 518 (Thomas, J.,

concurring in the judgment).[5] In *R.A.V.*, the Court explained that the government may make content-based distinctions within the category of commercial speech based only on "the characteristics of commercial speech that justif[y] depriving it of full First Amendment Protection." 505 U.S. at 388.

In each commercial speech case in which the issue was raised, however, this Court *reserved* the question whether strict scrutiny applies because the Court concluded that the restriction in question could not satisfy even the intermediate-scrutiny standard. See *Thompson* v. *Western States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002) (describing the challenge to *Central Hudson*, but finding "no need in this case to break new ground"); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 554-55 (2002) (same); *Greater New Orleans*, 527 U.S. at 184 (same); *44 Liquormart*, 517 U.S. at 504 (same); *Discovery Network*, 507 U.S. at 416 n.11 (same).

These decisions have led to uncertainty and inconsistencies in the application of *Central Hudson* to truthful, non-deceptive commercial speech. This case illustrates the point. Here, petitioners argued, and the district court held, that subsection 442-h(3) is a content-based restriction on speech and that this Court's decisions require the application of strict scrutiny. App. 22a-23a. The court of appeals reversed. It was of the wholly different view that this Court's recent decisions actually constitute a "reject[ion of] the argument

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[5] *See also Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 571-72 (2001) (citing "continuing concerns that the [*Central Hudson*] test gives insufficient protection to truthful, nonmisleading commercial speech") (Kennedy and Scalia, JJ., concurring); *id.* at 572 ("I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial'") (Thomas, J., concurring); *Discovery Network*, 507 U.S. at 416 n.11 (Stevens, J.).

that strict scrutiny should apply to regulations of commercial speech that are content-specific." *Id.* at 9a.[6]

That decision cannot be reconciled with the Court's analysis in its recent decisions. In fact, a majority of this Court has concluded that *Central Hudson* does not state the appropriate test for content-based restrictions on non-deceptive commercial speech. In *44 Liquormart*, Justice Stevens, joined by Justices Kennedy and Ginsburg, explicitly rejected the argument that "*all* commercial speech regulations are subject to a similar form of constitutional review." 517 U.S. at 501. These justices concluded that the justifications for intermediate scrutiny of laws constraining commercial speech simply are not applicable to content-based restrictions on truthful, non-misleading commercial speech that do not address commercial harms. *Id.* "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.* See *id.* at 502-03 ("[i]t is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.' Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms") (citations omitted).[7] In sum,

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[6] In disagreement with the Second Circuit, other lower courts have applied strict scrutiny to content-based commercial speech restrictions. *See, e.g., MD II Entm't, Inc.* v. *City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994); *Citizens United for Free Speech II* v. *Long Beach Township Bd. of Commissioners*, 802 F. Supp. 1223, 1232 n.7 (D.N.J. 1992) ("[i]t is clear from the Supreme Court's recent decision in *R.A.V.*, that commercial speech must be protected by the usual strictures against content-based distinctions").

[7] *Compare* 517 U.S. at 501 ("[w]hen a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive

the opinion concluded that "the State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated,' rather than the 'commercial aspect of [it].'" *Id.* at 499 (quoting *Linmark Assoc.* v. *Willingboro*, 431 U.S. 85, 96 (1977)).

Thus, it appears that these three justices would hold that content-based restrictions on truthful, non-misleading speech that are not directed at "commercial harms" are subject to strict scrutiny. Two additional justices appear to have gone even further. They have indicated that strict-scrutiny analysis should apply to *all* truthful, non-misleading commercial speech. See, *e.g.*, *44 Liquormart*, 517 U.S. at 522 (asserting that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech") (Thomas, J., concurring); *id.* at 517 (the *Central Hudson* test has "nothing more than policy intuition to support it") (Scalia, J., concurring).

This trend in the Court's jurisprudence would bring the law governing commercial speech into harmony with its general approach to the First Amendment. Content-based restrictions on speech are highly suspect. Indeed, a regulation restricting speech because of its content will rarely ever be permissible. See *Playboy Entm't Group*, 529 U.S. at 813 ("[s]ince [the law] is a content-based speech restriction, it can stand only if it satisfies strict scrutiny"); *R.A.V.*, 505 U.S. at 382 ("[c]ontent-based regulations are presumptively invalid").

The Court's decision in *R.A.V.* reflects the growing congruence between the standards governing content-based restrictions of commercial speech and those governing content-based restrictions generally. In *R.A.V.*, the Court explained the difference between constitutional and

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sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review").

unconstitutional content-based distinctions in commercial-speech restrictions:

> [A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion. [*Id.* at 388-89. (citations omitted)]

In *R.A.V.*, the Court applied strict scrutiny to content-based regulation of wholly *unprotected* categories of speech, such as fighting words and obscenity. *A fortiori*, this decision should require application of strict scrutiny to a content-based restriction on the plainly protected category of commercial speech that does not address commercial harms.

The Court's cases appear to recognize that *Central Hudson*'s balancing test is insufficiently rigorous to evaluate the constitutionality of content-based restrictions on truthful, non-misleading commercial speech. Moreover, the Court has noted that "judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans*, 527 U.S. at 184. See also Alex Kozinski & Stuart Banner, *Who's Afraid Of Commercial Speech?* 76 Va. L. Rev. 627, 631 (1990) ("cases have been able to shed little light on *Central Hudson*, aside from standing as ad hoc subject-specific examples of what is permissible and what is not"); David P. Kasakove, *New York State Ass'n of Realtors, Inc.* v. *Shaffer: When the Second Circuit Chooses Between Free Speech and Fair Housing, Who Wins?* 61 Brook. L. Rev. 397, 409-10 (1995) ("[r]ather than giving much-needed direction to the lower courts, the Supreme Court's case-by-case approach has led to such unpredictability that [u]nless a case has facts very much like those of a prior case, it is nearly impossible to predict the

winner") (internal quotation omitted). The Court should take this opportunity expressly to hold that the First Amendment requires strict scrutiny of content-based restrictions of commercial speech that do not address commercial harms.

This case is an excellent vehicle for delineating the scope of *Central Hudson*. First, the issue was raised and decided below. Indeed, the court below seemed to recognize that the level of scrutiny would be outcome determinative here. Second, the law at issue (subsection 442-h(3)) indisputably presents the question whether strict scrutiny applies to content-based restrictions on truthful, non-misleading speech not directed at commercial harms. The law is content-based because it forbids *real estate solicitations*, and no other solicitations. In addition, the court of appeals relied solely on the State's alleged interest in protecting residential privacy, not on any interest related to *commercial* harms.

Moreover, subsection 442-h(3) would be subject to strict scrutiny under the test of the plurality in *44 Liquormart*, 517 U.S. at 501 (endorsing strict scrutiny where the law "prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process") and *a fortiori*, under the more stringent test of those in concurrence, *id.* at 522-23 (endorsing strict scrutiny of content-based restrictions of commercial speech intended to manipulate consumer choice through suppression of accurate commercial information).

Accordingly, the case gives the Court the opportunity to determine whether content-based restrictions on truthful, non-misleading commercial speech not intended to address commercial harms are subject to strict scrutiny. The Court's numerous discussions of this subject have generated substantial uncertainty and conflict in the lower courts. This Court should grant review to resolve this important and recurring question.

II. ASSUMING INTERMEDIATE SCRUTINY IS APPROPRIATE, THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS BY APPROVING AN UNDERINCLUSIVE, CONTENT-BASED, RESIDENT-ACTIVATED RESTRICTION ON TRUTHFUL, NON-DECEPTIVE SPEECH.

When examining a restriction on commercial speech under *Central Hudson*, courts apply a four-part test: (i) whether the speech concerns lawful activity and is not misleading, (ii) whether the asserted government interest is substantial, (iii) whether the regulation directly and materially advances the government interest asserted, and (iv) whether there is a reasonable fit between the legislature ends and the means chosen to accomplish those ends. *Central Hudson*, 447 U.S. at 566. The government "bears the burden of identifying a substantial interest and justifying the challenged restriction." *Greater New Orleans*, 527 U.S. at 183.

Here, the parties agree that the speech in question is lawful and not misleading and that the government interest – homeowner privacy – is substantial. Thus, the issue is whether the State has carried its burden on the third and fourth elements of the test by demonstrating that the law materially advances the government interest and that there is a "reasonable fit" between the law's restriction on speech and that interest. *Discovery Network*, 507 U.S. at 417 (quoting *Board of Trs.* v. *Fox*, 492 U.S. 469, 480 (1989)). See also *Fox*, 492 U.S. at 480 (the regulation should be "narrowly tailored").

The restriction on speech at issue is acknowledged to be underinclusive -- that is, it addresses only one aspect of the intrusion on homeowner privacy by mail, telephone, and in-person solicitation. The Second Circuit nonetheless held that this content-based restriction on speech passes muster under the third and fourth prongs of the *Central Hudson* test. That decision conflicts with a decision of the Seventh Circuit on

very similar facts, holding that, in these circumstances, "underinclusiveness indicate[s] a lack of reasonable fit." *Pearson* v. *Edgar*, 153 F.3d 397, 404 (7th Cir. 1998) (citing *Discovery Network*, 507 U.S. at 417-18). It also conflicts with decisions of this Court. The issue of whether an underinclusive, content-based restriction of commercial speech is unconstitutional is recurring and important. Yet the lower courts are in a state of disarray that warrants this Court's attention.

The decision below conflicts with *Pearson* and with decisions of this Court in another important regard. Specifically, the Second Circuit held that an underinclusive, content-based law satisfied the "reasonable fit" test of *Central Hudson* because it employed the device of resident activation. App. 12a. By contrast, applying decisions of this Court, the Seventh Circuit held that resident-activated restrictions on speech save underinclusive laws only when the restriction on speech is content-neutral. Governments experimenting with resident-activated devices to protect privacy need to know whether such a device justifies a content-based restriction on speech or whether the Constitution forbids the State to use such a device to single out speech with a particular content for unique disapprobation and punishment.

A. The Second Circuit's Decision Allowing An Underinclusive, Content-Based Restriction On Speech Conflicts With A Decision Of The Seventh Circuit And With This Court's Decisions.

1. In a case involving a restriction on real estate solicitation that is virtually identical to the New York law at issue here, the Seventh Circuit held that the law's "underinclusiveness indicated a lack of reasonable fit" under the *Central Hudson* test. See *Pearson*, 153 F.3d at 404. At issue in *Pearson* was an Illinois law "allow[ing] homeowners to notify real estate agents that they do not wish to be solicited." *Id.* at 399. Like the New York law, the Illinois law was passed to prevent

blockbusting; protection of homeowner privacy was first offered as a justification in litigation challenging the law. Ironically, after its passage, a community group in the Beverly neighborhood of Chicago "canvassed the neighborhood to find homeowners who did not want to be solicited by real estate agents," in order to hinder real estate agents' efforts to market neighborhood homes to minority purchasers. *Id.* Real estate professionals challenged the law as a violation of the First Amendment. *Id.*

The Seventh Circuit held that under this Court's decision in *Discovery Network*, the Illinois law violated the First Amendment.[8] After concluding that the evidence of blockbusting was inadequate to justify the law, the Seventh Circuit found that the State's interest in residential privacy was substantial. The court held, however, that the law did not satisfy the requirement of a "reasonable fit" between the Illinois statute and the protection of privacy, because it was underinclusive and because it undervalued commercial speech. *Id.* at 103.

The Seventh Circuit first pointed out that the law at issue in *Discovery Network* – banning commercial newsracks and leaving non-commercial newsracks unregulated – "was underinclusive – it only attacked part of the problems of safety and esthetics caused by newsracks." *Id.* at 404. The court of appeals read *Discovery Network* to hold that

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[8] The Seventh Circuit initially affirmed the district court's denial of a preliminary injunction and held that the law did not violate the First Amendment. *See Curtis* v. *Thompson*, 840 F.2d 1291 (7th Cir. 1988). On remand, the district court dismissed the case. The Seventh Circuit affirmed, and the plaintiffs petitioned for a writ of certiorari. *Pearson* v. *Thompson*, 1989 WL 88367 (N.D. Ill. July 26, 1989), *aff'd*, 955 F.2d 46 (7th Cir. 1992), *vacated sub nom. Pearson* v. *Edgar*, 507 U.S. 1015 (1993). This Court granted the petition, vacated the Seventh Circuit's decision, and remanded the case "for further consideration in light of *Cincinnati* v. *Discovery Network, Inc.*, *ante*, p. 410." *Pearson v. Edgar*, 507 U.S. 1015, 1015 (1993).

"underinclusiveness indicate[s] a lack of reasonable fit." *Id.* The court explained that previously it had "defer[red]" to the State's "judgment that real estate solicitation poses a special problem to residential privacy." *Id.* After *Discovery Network*, however, the court recognized that "the distinction between real estate solicitation and other types of solicitation is not plausible absent evidence that real estate solicitation poses a particular threat to residential privacy" that is not posed by other commercial solicitation. *Id.*

The Seventh Circuit stated that there was no evidence that real estate solicitation uniquely harms residential privacy, and held that "[a]bsent such evidence, a mechanism where homeowners can reject real estate solicitation but not other kinds of solicitation cannot be said to advance the interest in residential privacy 'in a direct and material way.'" *Id.* (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993)). "Severe underinclusiveness is not forgivable after *Discovery Network*'s condemnation of unjustified limited bans if the underinclusiveness indicates poor fit." *Id.* See *id.* at 403 ("if the state were concerned about the intrusion of solicitation on residential privacy, it could have addressed the problem more effectively by allowing homeowners to reject solicitation of any commercial enterprise, not just of real estate agents").

Indeed, in *Pearson*, the Seventh Circuit acknowledged that its former reliance on *Rowan*, 397 U.S. 728, was "weakened by *Discovery Network*'s emphasis on reasonable fit." *Pearson*, 153 F.3d at 404. In *Rowan*, "a homeowner could prevent *any* material from entering his home, even a 'dry goods catalogue,' if the homeowner deemed the material offensive." *Pearson*, 153 F.3d at 404. Thus, "*Rowan* involved no governmental distinction between one kind of offensive material and another – all distinctions were made by the homeowner." *Id.* In contrast, under the Illinois law, "the state, not the homeowner, has made the distinction between real estate solicitations and other solicitations without a logical privacy-based reason." *Id.* Thus, the court concluded,

"[w]e can no longer, after *Discovery Network*, place the interest in residential privacy above the interest in logical distinctions in speech restrictions absent some showing that the restriction reasonably fits the justification." *Id.*

Finally, the court concluded that its prior decision had significantly undervalued commercial speech in a way now prohibited by *Discovery Network*. *Discovery Network* required the court carefully to scrutinize content-based restrictions of commercial speech; and the court was unable to find that the State's interest in protecting residential privacy was "absolutely greater" than the First Amendment right at issue. *Pearson*, 153 F.3d at 405.

Had the Seventh Circuit addressed the New York law at issue here, it would have struck that law down. Under the New York law, precisely as under the Illinois law, the State has distinguished real estate solicitations from other commercial and non-commercial solicitations for reasons unrelated to privacy. The record in this case, like the record in *Pearson*, is devoid of evidence that real estate solicitation is intrusive upon homeowner privacy in ways that other solicitation is not. In this case, the State never compared the problems caused by real estate solicitation with the problems caused by other kinds of solicitations, and thus never satisfied the *Pearson* court's requirement that the State demonstrate unique harms caused by the disapproved type of solicitation. Indeed, the district court below expressly *found* that the State had "not made a showing that solicitation by realtors causes greater harm to homeowners' privacy interests than do other forms of commercial speech that broadcast through like media sources." App. 25a. And here, as in *Pearson*, it is "the state, not the homeowner," that is distinguishing offensive from inoffensive solicitation based on its content. 153 F.3d at 404. The two decisions cannot be reconciled.

2. As *Pearson* reveals, the decision below also conflicts with the decision of this Court in *Discovery Network*. There, the government argued that there was a reasonable fit

between its content-based restriction of commercial speech (the ban on newsracks dispensing *commercial* handbills) and its interest (improving safety and esthetics) because *any* decrease in the total number of newsracks served the government interest. This Court rejected that argument, stating that the distinction between commercial and non-commercial newsracks "bears no relationship *whatsoever* to the particular interests the city has asserted." 507 U.S. at 424. As the Court explained, with respect to the asserted "interest in esthetics," the commercial "newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks." *Id.* at 425.

Moreover, the Court noted that Cincinnati "has not asserted an interest in preventing commercial harms by regulating the information distributed by [commercial] newsracks, which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech." *Id.* at 426. Thus, the Court concluded that "[i]n the absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing 'commercial handbills.'" *Id.* at 428. Cf. *44 Liquormart*, 517 U.S. at 512 n.20 (in *Discovery Network*, "we assumed that States could prevent all newsracks from being placed on public sidewalks, but nevertheless concluded that they could not ban only those newsracks that contained certain commercial publications").

Similarly here, the distinction between real estate solicitations and other commercial solicitations "bears no relationship whatsoever" to privacy, the sole state interest relied on by the court of appeals. The intrusion on privacy arises from the arrival of the solicitation, not its content. The invasion is the same whether the contact comes from a real

estate licensee or some other person. Cf. *Watchtower Bible*, 122 S. Ct. at 2091, ("[t]he annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit"). Neither the New York legislature nor the court below cited any unique commercial harm prevented by banning real estate solicitations, and the record contains no such evidence.[9]

Equally to the point, the provision makes no effort to distinguish among mail, telephone and in-person real estate solicitations whose intrusive effects are entirely distinct. Cf. *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) ("the 'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned'") (citation omitted); *Edenfield* v. *Fane*, 507 U.S. 761, 776 (1993) (if potential clients are not receptive to a CPA's "initial telephone solicitation, they need only terminate the call. Invasion of privacy is not a significant concern"). For this reason also, the incremental benefit to privacy interests provided by the ban does not justify the content-based ban on commercial speech.[10] See

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[9] Indeed, the record shows that residents complained about non-real estate solicitations. J.A. 1835, 1840-50, 1851-54, 1855-58.

[10] In support of its contention that this underinclusiveness does not defeat a claim that a State interest has been materially advanced, the Second Circuit cited *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 478 U.S. 328 (1986), *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418 (1993), and *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981). This reliance is misplaced. In *44 Liquormart*, this Court explained that the *Posadas* court "clearly erred in concluding that it was 'up to the legislature' to choose suppression [of speech] over a less speech-restrictive policy," saying that *Posadas* "cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available." 517 U.S. at 509. Similarly, in *Edge*, the Court upheld a federal statute permitting only broadcasters located in States with legalized lotteries to air lottery advertising. That statute "was designed to regulate advertising about an activity that had been deemed illegal in the

Discovery Network, 507 U.S. at 426 (explaining the "fallacy of the city's argument that a reasonable fit is established by the mere fact that the entire burden imposed on commercial speech by its newsrack policy may in some small way limit the total number of newsracks on Cincinnati's sidewalks"); *id.* at 417 ("[t]he fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition").[11]

For the same reasons, the Second Circuit's decision conflicts with *Carey* v. *Brown*, 447 U.S. 455 (1980). In that case, citing its interest in residential privacy, the State enacted a statute prohibiting all picketing except labor picketing. The Court held that the statute was unconstitutional, because "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy." *Id.* at 465. The statute "broadly permit[ed] all peaceful labor picketing notwithstanding the disturbances it would undoubtedly engender," while making "no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest." *Id.* See also *Police Dep't* v. *Mosley*, 408 U.S. 92 (1972) (same); *Greater New Orleans*, 527 U.S. at 184-87 (federal statute banning

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jurisdiction in which the broadcaster was located," and had to be contrasted with statutes "target[ing] information about entirely lawful behavior." *44 Liquormart*, 517 U.S. at 509 (discussing *Edge*, 509 U.S. at 433-34). Finally, in *Metromedia*, the city restricted speech (commercial billboards) by restricting the *location* of commercial billboards (prohibiting off-site billboards while allowing on-site billboards). 453 U.S. at 507-12. None of these decisions supports the Second Circuit's authorization of an underinclusive restriction where, as here, the law indicates the State's disapproval of speech with a specified content.

[11] *See also* Robert T. Cahill, Jr., *City of Cincinnati v. Discovery Network, Inc.: Towards Heightened Scrutiny for Truthful Commercial Speech*, 28 U. Rich. L. Rev. 225, 245-46 (1994) (asserting that *Discovery Network* signals an increasingly in-depth analysis of the means-ends fit).

casino gambling advertising by private operators violates the First Amendment, *inter alia*, because it permits advertising by tribal casinos).

The Second Circuit's decision that New York's law is narrowly tailored to address the State's interest in residential privacy thus conflicts with this Court's decisions. Content-neutral alternatives were available that would have fully achieved the State's purpose (*i.e.*, banning certain methods of solicitation and/or solicitation by all speakers). As this Court summarized in *R.A.V.*

> [t]he dispositive question . . . is whether content discrimination is reasonably necessary to achieve [the government's] compelling interests; it plainly is not. *An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect.* In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians . . . are entitled to express that hostility – but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree. [505 U.S. at 395-96 (footnote omitted) (emphasis supplied).][12]

Content-based, underinclusive restrictions on truthful, non-misleading commercial speech raise a warning flag, signaling the courts that the law's real purpose may be to suppress certain ideas. Neither subsection 442-h(3) nor its legislative

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[12] *See also* Laurence Tribe, *American Constitutional Law* § 12-3, at 800 (2d ed. 1988) (content neutrality "may sometimes result, perhaps ironically, in the *reduced* protection of speech, since one method of 'equalizing' is not to permit more speech but rather to adopt even more suppressive content-neutral regulations") (citing Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 205 (1983)).

history hints at any State concern for residential privacy; nor did the State offer any privacy-based justification for restricting real estate solicitations and not others. The law has nevertheless been used to justify the State's antipathy to particular speakers with a disfavored message concerning lawful activity that is not misleading. Cf. *Metromedia*, 453 U.S. at 510 (aesthetic judgments must be carefully examined "to determine if they are only a public rationalization of an impermissible purpose"). Under this Court's decisions applying *Central Hudson* to underinclusive, content-based limitations on commercial speech, subsection 442-h(3) is unconstitutional.

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In sum, the Second Circuit's decision conflicts with decisions of other lower courts and with numerous decisions of this Court, making clear that content-based, underinclusive restrictions on truthful, non-misleading commercial speech are unconstitutional where less restrictive, content-neutral alternatives exist. This Court should grant the petition to resolve the conflict and uncertainty about whether content-based, underinclusive restrictions on truthful, non-misleading commercial speech are constitutional under *Central Hudson*.

B. The Decision Creates A Conflict In The Courts Of Appeals And Is In Tension With Decisions Of This Court Regarding The Constitutionality Of Resident-Activated Mechanisms That Implement Content-Based Restrictions Of Speech.

The statutory provision at issue creates a mechanism that authorizes residents in specially designated areas to register and stop real estate solicitations – and only real estate solicitations. The Second Circuit acknowledged that New York has singled out real estate solicitation for negative treatment. The court nonetheless concluded that the provision was not unconstitutional, content-based discrimination. The court concluded that the law satisfied the "reasonable fit"

requirement of *Central Hudson* by employing the kind of "resident-activated restriction" that this Court had "endorsed." App. 12a.

The Second Circuit saw nothing wrong with the State's circumvention of the First Amendment's ban of content-based restrictions on speech by establishing a mechanism that facilitates individuals' refusal to hear speech containing specified content (and prohibits some willing listeners from hearing it, see N.Y. Comp. Code R. & Regs. tit. 19, § 175.17(d)(1)(i), (ii), (e)). Its decision, however, is contrary to that of other lower courts and inconsistent with this Court's cases addressing laws creating resident-activated restrictions on speech.

First, the decision conflicts with the Seventh Circuit's decision in *Pearson*, holding that the resident-activated restrictions on real estate solicitation in the Illinois law are unconstitutional.[13] See *supra* at 19-21. Cf. also

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[13] Similarly, in cases involving laws restricting telephone solicitation, several courts have held that provisions forbidding callers to use artificial or pre-recorded voices to deliver commercial messages without prior caller consent are unconstitutional. The courts acknowledged that the content-based restriction protected residential privacy, but struck down the laws because the government failed to demonstrate that commercial recorded advertisements intrude upon privacy in some way that is different from other recorded messages. *See Lysaght* v. *New Jersey*, 837 F. Supp. 646, 652 (D.N.J. 1993) ("the Supreme Court rejected the government's reliance on its interest in protecting the public from 'offensive' speech, and specifically declined 'to recognize a distinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech'") (footnote omitted); *Moser* v. *FCC*, 826 F. Supp. 360 (D. Or. 1993). The Ninth Circuit reversed *Moser*, 46 F.3d 970 (9th Cir. 1995), but solely on the ground that the law was not mandatory – *i.e.*, that the FCC was not required to ban recorded advertisements absent advance consent and left to another day the constitutionality of the regulations doing precisely that. The government can outlaw all recorded messages regardless of content, see *Van Bergen* v. *Minnesota*, 59 F.3d 1541, 1546 (8th Cir. 1995) (upholding Minnesota law doing so). The government may not, however,

South/Southwest Ass'n of Realtors v. *Village of Evergreen Park*, 109 F. Supp. 2d 926, 928 (N.D. Ill. 2000) (upholding content-neutral law authorizing residents to preclude any solicitation as "follow[ing] the *Pearson* court's recommendation" because it "does not make an artificial and unjustified distinction between realtors' in-home commercial speech and all other in-home commercial speech").

Second, this Court has made clear that laws establishing and enforcing resident-activated restrictions on speech must be content-neutral. In each case in which such a law has been upheld, the Court has emphasized this point. For example, in *Rowan*, 397 U.S. at 737, the Court considered the constitutionality of a statute authorizing mail customers to require the post office to cease delivering mail from a particular mailer. Although the statute was directed at sexually explicit materials, this Court emphasized in upholding the law that, in reality, the mail customer could stop delivery from any mailer for any reason and therefore that the resident-activated restriction was content-neutral. See *id.* ("the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalogue because he objects to the contents – or indeed the text of the language touting the merchandise"). See *Pearson*, 153 F.3d at 404 ("*Rowan* involved no governmental distinction between one kind of offensive material and another – all distinctions were made by the homeowner").

Similarly, in *Playboy Entertainment Group*, the Court struck down section 505 of the Telecommunications Act of 1996, a provision requiring cable television operators providing channels dedicated to sexually-oriented programming to fully scramble or block those channels (*i.e.*, to prevent any signal bleed) or limit their transmission to hours when children are unlikely to be viewing. The Court

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enact and enforce a content-based restriction on speech through the indirect mechanism of a resident-activated restriction.

held that the provision was a content-based regulation of speech that was not narrowly tailored because the statute itself contained a less restrictive alternative – section 504, a provision requiring a cable operator, upon request by a subscriber, to fully scramble or block any channel that the subscriber did not wish to receive. Of particular importance here, the Court explained that "[s]ection 504 [i]s content neutral and would be less restrictive of Playboy's First Amendment rights." 529 U.S. at 810. Cf. *Watchtower Bible*, 122 S. Ct. at 2091 ("the posting of 'No Solicitation' signs . . . coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener").

An opt-out mechanism survives constitutional scrutiny only if it is "content-neutral, narrowly drawn, serve[s] a significant governmental interest, and leave[s] open ample alternative channels of communication." Deborah L. Hamilton, *The First Amendment Status of Commercial Speech: Why the FCC Regulations Implementing the Telephone Consumer Protection Act of 1991 Are Unconstitutional*, 94 Mich. L. Rev. 2352, 2383 (1996). Here the resident-activated mechanism is neither content-neutral nor narrowly drawn: Residents may opt not to receive real estate solicitations, but no others. The law reflects and enforces the State's disapproval of speech of a specified content. It is therefore unconstitutional.

The use of resident-activated mechanisms to impose restrictions on communications is an increasingly popular government tool, because it allows individuals to make choices about the communications that they will receive in the home. But where, as here, the government enacts a resident-activated mechanism that targets communications with a disfavored content, that law constitutes governmental abridgement and punishment of speech based on its content. This Court should grant the petition to resolve the conflict and hold that resident-activated restrictions on communications

must be content-neutral (*i.e.*, directed at a particular type of communication such as telephone calls or at communication by all speakers).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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October 23, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 01-7954.

PATRICIA C. ANDERSON, MICHAEL A. HOSEIN
and STEPHEN E. PARKER,
Plaintiffs-Appellees,

v.

ALEXANDER F. TREADWELL, as Secretary of State
of the State of New York,
Defendant-Appellant.

Argued April 4, 2002.
Decided June 25, 2002.

Before NEWMAN, KEARSE, and LEVAL, Circuit Judges.

JON O. NEWMAN, Senior Circuit Judge.

This appeal requires us to decide whether a state's regulation of residential real estate solicitations by licensed real estate salespersons violates their free speech rights under the First Amendment. Defendant-Appellant Alexander Treadwell, New York's Secretary of State, appeals from the June 29, 2001, judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, District Judge), granting summary judgment to Plaintiffs-Appellees Patricia Anderson, Michael A. Hosein, and Stephen E. Parker, real estate sales licensees, who challenged the constitutionality of N.Y. Real Prop. Law § 442-h(3)

(McKinney 2001) on its face and as applied, and regulations promulgated under the statute. The District Court ruled unconstitutional subsection 442-h(3) and the regulations establishing "cease-and-desist zones" in which homeowners can elect not to receive at-home real estate solicitations. Judge Platt concluded that the regulatory scheme lacked a "reasonable fit" between the State's alleged interest in homeowner privacy and the means chosen to serve that interest. For the reasons stated below, we reject the Appellees' constitutional challenges and therefore reverse.

Background

New York Human Rights Law § 296(3-b) outlaws "blockbusting"—the practice of soliciting real estate sales and listings by representing that a change in the racial, ethnic, or religious character of a block, neighborhood, or area is underway.[1] As we have previously recognized, "[i]n its most systematic and crudest form, blockbusting entails the 'churning' of a local real estate market, a practice in which real estate brokers engage in frenzied solicitation practices that prey upon the racial and ethnic fears of persons residing in transitional neighborhoods as a means for increasing the volume of residential real estate transactions. While realtors gain the benefit of the commissions generated by the increase in sales, homeowners and communities suffer the detriment of declining property values and neighborhood instability

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[1] N.Y. Exec. Law § 296(3-b) (McKinney 2001) states:

> It shall be an unlawful discriminatory practice for any real estate broker, . . . for the purpose of inducing a real estate transaction . . . to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin, sex, disability, marital status, or familial status of the owners or occupants in the block, neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood or area in which the real property is located . . . .

brought on by panic selling, the fanning of racial tensions and promoting of ethnic stereotypes." *New York State Association of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 835-36 (2d Cir.1994) ("*NYSAR*"). *NYSAR* thus recognized that "blockbusting" is not only the solicitation of homeowners to sell their homes out of fear of changing neighborhood demographics but also the harmful effects that result when such solicitations precipitate home sales.

In 1989, in an effort to enforce its ban on blockbusting, the New York State Legislature enacted Real Property Law § 442-h. As enacted, subsection 442-h(2) allows the Secretary of State to find, after public hearing and investigation, that a defined geographic area is subject to blockbusting, and to adopt a "nonsolicitation order" forbidding all solicitations of residential real estate listings or sales from any homeowner within that zone. Subsection 442-h(3) authorizes the Secretary, upon finding a pattern of intense and repeated solicitations within a defined geographic area, to establish "cease-and-desist zones," within which real estate licensees[2] are forbidden from directing in-home solicitations to homeowners who have registered in advance with the Secretary of State their wish not to receive such solicitations.

In 1991, the New York State Association of Realtors challenged the nonsolicitation orders on First Amendment grounds, and this Court, applying the test for commercial speech, ruled the nonsolicitation regulation promulgated pursuant to subsection 442-h(2) invalid because the Secretary had failed to provide direct and concrete evidence of the harm that was alleged to justify the restriction. *See NYSAR,* 27 F.3d at 842-44. Accordingly, the Court concluded that the

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[2] The prohibition extends not only to real estate brokers and salespersons licensed by the Department of State, referred to collectively as "real estate licensees," but also to real estate speculators, who are "regularly engaged in the trade or business of buying and selling real estate." N.Y. Real Prop. Law § 442-h(3) (McKinney 2001).

Secretary had failed to establish a "reasonable fit" between the degree of the harm and the scope of the restriction. *See id.* at 844.

Under subsection 442-h(3),[3] the Secretary can create cease-and-desist zones in those areas where he determines that "owners of residential real estate property . . . are subject to intense and repeated solicitations by real estate brokers . . . to place their property for sale." In these zones, real estate licensees are prohibited from soliciting a listing from any owner who has filed a statement with the Secretary of State expressing the wish not to be solicited, and whose name appears on the cease-and-desist list. A rule establishing such

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[3] N.Y. Real Prop. Law § 442-h(3)(a) (McKinney 2001) provides:

> If the secretary of state determines that some owners of residential real property within a defined geographic area are subject to intense and repeated solicitation by real estate brokers and salespersons to place their property for sale with such real estate brokers or salespersons, or are subject to intense and repeated solicitation by other persons regularly engaged in the trade or business of buying and selling real estate to sell their real estate, the secretary of state may adopt a rule establishing a cease and desist zone, which zone shall be bounded or otherwise specifically defined in the rule. After the secretary of state has established a cease and desist zone, the owners of residential real property located within the zone may file an owner's statement with the secretary of state expressing their wish not to be solicited by real estate brokers, salespersons or other persons regularly engaged in the trade or business of buying and selling real estate. The form and content of the statement shall be prescribed by the secretary of state. After a cease and desist zone has been established by the secretary of state, no real estate broker, salesperson or other person regularly engaged in the trade or business of buying and selling real estate shall solicit a listing from any owner who has filed a statement with the secretary of state if such owner's name appears on the current cease and desist list prepared by the secretary of state. The prohibition on solicitation shall apply to direct forms of solicitation such as the use of the telephone, the mail, personal contact and other forms of direct solicitation as may be specified by the secretary of state.

a zone is effective for five years, after which the Secretary can re-adopt the rule or it will expire.

Current regulations promulgated pursuant to subsection 442-h(3) establish five cease-and-desist zones, and delineate their boundaries. N.Y. Comp. Codes R. & Regs. tit. 19, § 175.17(c)(2) (2001). The regulations prohibit a real estate licensee from "solicit[ing] the sale, lease or the listing for sale or lease of residential property" from an owner in the cease-and-desist zone who has signed onto the cease-and-desist list. *Id.* § 175.17(c)(1). "Solicitation" is defined as "an attempt to purchase or rent or an attempt to obtain a listing of property for sale, for rent or for purchase,"[4] and the solicitation ban extends to "use of the telephone, mails, delivery services, personal contact or otherwise causing any solicitation, oral or written," to be left for the owner or anyone else at the owner's home address. *Id.* § 175.17(d)(1). The solicitation ban does not cover classified advertising in non-real estate publications, advertisements placed in public view, or radio or television advertisements. *Id.* § 175.17(d)(2). The regulations define residential property as one-, two-, and three-family houses, including co-ops and condos. *Id.* § 175.17(e).

Currently, approximately 20,000 homeowners are on the cease-and-desist list, with more than 14,000 in Queens County. The Secretary determines whether any particular communication is an unlawful solicitation by investigating

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[4] The two uses of the word "purchase" in the definition of "solicitation" are unclear. The first use, covering "an attempt to purchase," apparently refers to a speculator's attempt to purchase a homeowner's home for resale. The second use, covering "an attempt to obtain a listing of property for . . . purchase," is less clear; normally a "listing" refers to a property offered for sale. We need not pursue this aspect of the definition because none of the parties has attached any significance to the definition of "solicitation" or mentioned the uncertainty as to the meaning of "purchase."

the content of the communication and the intent of the licensee in sending the communication. The regulation has been applied broadly to prohibit most communications by licensees to residents located at homes on the cease-and-desist list, and licensees have been found to have violated the regulations by distributing business cards, or having promotional advertisements in mass distributed coupon packs that arrive at homes on the cease-and-desist list.

The Plaintiffs are real estate professionals licensed by the Department of State, offering services in New York, including areas that have been designated cease-and-desist zones by the Defendant. They contend that, in order to obtain real estate listings, they rely upon direct, in-home solicitations, including in-home visits, telephone calls, and literature delivered directly to homeowners. Plaintiff Parker brings the suit as a sales agent reasonably fearing prosecution and risking sanction for violation of subsection 442-h(3). He alleges that he has had particular difficulty developing his business due to this restriction. The Plaintiffs allege that the solicitation of listings is critical to the success of a real estate licensee, and that there is no cost-effective alternative to communicating truthful, non-deceptive information about the real estate market, the licensee, the licensee's company, and the nature of their services.

Plaintiffs Hosein and Anderson were charged by the Defendant with a disciplinary violation due to Hosein's mailing a flier to an addressee on the cease-and-desist list for Queens County. The flier introduced Hosein to potential clients, and detailed some of the services provided by his company, Coldwell Banker Halmike Realty. The flier concluded with the following sentence, which the Secretary of State deemed to be a solicitation for a listing: "If you have considered selling or buying a home now or in the near future, or simply want to find out what your home is worth in today's market, don't hesitate to call." Hosein and Anderson

pled no contest to the charge of violating section 175.17 by soliciting a listing for the sale of residential property, and entered into a consent order with the Department of State, pursuant to which each paid a $300 fine.

The Plaintiffs commenced this action pursuant to the Constitution and 42 U.S.C. § 1983 in the United States District Court for the Eastern District of New York in February 1999. On cross-motions for summary judgment, the District Court granted the Plaintiffs' motion for summary judgment, concluding that subsection 442-h(3) and the regulations promulgated thereunder were unconstitutional. The District Court applied the test for content-based regulations of speech, *see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000), and deemed the statute underinclusive as to the stated goal of homeowner privacy because it did not proscribe solicitation by other types of solicitors, *see City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). Accordingly, the Court concluded that the remedy did not "reasonably fit" with the problem it sought to address, *see Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and that the State had failed to show that less restrictive, content-neutral solutions were not available.

Discussion

I. Level of First Amendment Protection

One important determinant of the degree of protection afforded by the First Amendment is whether the activity sought to be regulated constitutes commercial or noncommercial speech. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). The "core notion" of commercial speech is that "which does no more than propose a commercial

transaction." *Id.* at 66, 103 S.Ct. 2875 (internal quotation marks omitted). Even a communication combining commercial and noncommercial elements, if it is an advertisement, makes reference to a specific product, and the speaker has an economic motivation for the communication, is properly characterized as commercial speech. *Id.* at 66-67, 103 S.Ct. 2875.

The Plaintiffs acknowledge that their communications include "truthful, non-deceptive information about themselves, the real estate market, the nature of their services, and those of their company." Brief for Appellees at 22. They claim that the regulations prevent them from providing "invaluable information regarding market conditions, financing and refinancing alternatives, and purchase/sale opportunities which would not otherwise come to the attention of area residents, their families, neighbors and friends." *Id.* at 22-23. In making the "common-sense" distinction between commercial and noncommercial speech, *Bolger,* 463 U.S. at 64, 103 S.Ct. 2875, we place this type of speech squarely into the category of commercial speech.

Somewhat side-stepping the commercial speech category, the Plaintiffs contend, in agreement with the District Court, that because the statute and regulation target only real estate solicitations, their constitutionality should be evaluated under the rigorous test applicable to content-based regulations of speech. Although some members of the Supreme Court have questioned whether the *Central Hudson* analysis should be applied in particular commercial speech cases, *see Greater New Orleans Broadcasting Association, Inc. v. United States,* 527 U.S. 173, 184, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) (Stevens, J.); *id.* at 197, 119 S.Ct. 1923 (Thomas, J., concurring in judgment); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 517, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (Scalia, J., concurring in part and in judgment); *Discovery Network,* 507 U.S. at 416 n. 11, 113 S.Ct. 1505

(Stevens, J.), the Court has rejected the argument that strict scrutiny should apply to regulations of commercial speech that are content-specific, adhering instead to the somewhat less rigorous standards of *Central Hudson*. *See Thompson v. Western States Medical Center*, — U.S. —, — - —, 122 S.Ct. 1497, 1503-04, 152 L.Ed.2d 563, — - — (2002) (acknowledging the challenge to the *Central Hudson* analysis, but finding "no need in this case to break new ground"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) (refusing to apply strict scrutiny to tobacco-specific regulations, and finding *Central Hudson* an adequate basis for commercial speech cases); *see also Long Island Board of Realtors, Inc. v. Incorporated Village of Massapequa Park*, 277 F.3d 622, 626 (2d Cir.2002) (rejecting the argument that a municipal ordinance regulating the display of signs should be subject to a heightened level of scrutiny as a content-based regulation).

II. The *Central Hudson* Test

Central Hudson sets forth a four-part framework for considering whether commercial speech may be validly restricted. First, for commercial speech to merit any First Amendment protection, it "must concern lawful activity and not be misleading." Next, the government must assert a substantial interest to be achieved by the restriction. If both these conditions are met, the third and fourth parts of the test are "whether the regulation directly advances the governmental interest asserted" and whether the regulation "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 563-66, 100 S.Ct. 2343.

A. Substantial State Interest

In this case, the Secretary does not dispute the District Court's conclusion that the prohibited solicitations contain speech that is lawful and not misleading. To meet the second

step of the analysis, the Secretary identifies two governmental interests promoted by subsection 442-h(3): (1) the State's interest in protecting neighborhoods from blockbusting, and (2) the State's interest in protecting the privacy of homeowners from harassing in-home real estate solicitations.[5] Because the State's regulatory scheme is sustainable solely on the homeowners' privacy interest, we need not consider the interest in avoiding blockbusting.

The homeowners' privacy interest is "substantial" within the meaning of *Central Hudson.* The Supreme Court has declared that protecting the "well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 625, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995)

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[5] The Plaintiffs complain that the Secretary has belatedly sought to rely on privacy as the asserted state interest, and that privacy is not mentioned in the statute, regulation, or legislative findings. However, the Secretary need not rely on the justifications offered by the State when the statute was enacted, since any insufficiency in the original motivation "does not diminish other interests that the restriction may now serve." *See Bolger,* 463 U.S. at 71, 103 S.Ct. 2875; *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 460, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978); *see also Greater New Orleans Broadcasting,* 527 U.S. at 187, 119 S.Ct. 1923 ("[E]nacted congressional policy and 'governmental interests' are not necessarily equivalents for purposes of commercial speech analysis."). While courts cannot supplant with hypothetical interests the precise interests put forward by the state in defense of its regulation, *see Edenfield v. Fane,* 507 U.S. 761, 768, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), the Supreme Court has repeatedly applied the *Central Hudson* test with reference to the interests asserted by the state in litigation challenging the regulation. *See Western States Medical Center,* — U.S. at —, 122 S.Ct. at 1504; *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 624-25, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 484-85, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995); *see also Western States Medical Center,* — U.S. at —, 122 S.Ct. at 1507 (noting that with respect to an interest described by the dissent, "[n]owhere *in its briefs* . . . does the Government argue that this interest motivated the advertising ban") (emphasis added).

(internal quotation marks omitted); *Frisby v. Schultz,* 487 U.S. 474, 484-85, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (noting, in upholding ban on residential picketing, that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions"); *see also Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton,* — U.S. —, 122 S.Ct. 2080, —, 153 L.Ed.2d 205 (2002) (noting that "residents' privacy" is among "important interests that the Village may seek to safeguard through some form of regulation of solicitation activity."). The Court has observed that "[e]ven solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient. . . . [P]rotection of the public from these aspects of solicitation is a legitimate and important state interest." *Edenfield v. Fane,* 507 U.S. 761, 769, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (internal citations and quotations omitted); *see also Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 462, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). As the District Court noted, the Secretary asserts such a situation here, stating that many homeowners feel "harassed, overwhelmed, threatened, and offended by the extensive telephonic, mail, flyers, and personal direct solicitation they receive." Accordingly, the interest in protecting homeowners from such harassing solicitations is a substantial state interest.

B. "Reasonable Fit"

The third and fourth steps coalesce to require "a reasonable fit between the legislature's ends and the means chosen to accomplish those ends." *Lorillard Tobacco,* 533 U.S. at 556, 121 S.Ct. 2404 (internal quotations marks omitted). The party seeking to uphold a restriction on commercial speech carries the burden of justifying it, and cannot satisfy this burden by "mere speculation or conjecture" but "must demonstrate that the harms it recites are real and that its

restrictions will in fact alleviate them to a material degree." *Edenfield,* 507 U.S. at 770-71, 113 S.Ct. 1792.

The record adequately demonstrates that the harm to homeowners' privacy from real estate solicitations is real, and that the cease-and-desist zones advance that interest directly and to a material degree. The popularity of the program, statements at the public hearings in support of the cease-and-desist zones, and complaints of violations of the registry all support the contention that homeowners feel harassed by the amount and the intensity of the solicitations, and that the cease-and-desist zones have alleviated that harm. Although a prohibition that makes only a minute contribution to the advancement of the state interest is not considered to have advanced the interest "to a material degree," *see Edenfield,* 507 U.S. at 771, 113 S.Ct. 1792; *Bad Frog Brewery, Inc. v. New York State Liquor Authority,* 134 F.3d 87, 100 (2d Cir.1998) ("[A] state must demonstrate that its commercial speech limitation is part of a substantial effort to advance a valid state interest, not merely the removal of a few grains of offensive sand from a beach of vulgarity."), the State's evidence satisfies the "material degree" standard.

As to reasonable fit, the regulation can hardly be accused of being "more extensive than necessary"; it is precisely co-extensive with those who are experiencing the particular harm that it is designed to alleviate. This is the kind of resident-activated restriction that was endorsed by the Supreme Court in *Rowan v. United States Post Office Department,* 397 U.S. 728, 737, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), and more recently in *Playboy,* 529 U.S. at 815, 120 S.Ct. 1878; *see also Watchtower Bible,* 122 S.Ct. at — (observing, as to regulation of activities including religious proselytizing, that provision for posting of "No Solicitation" signs and recognizing right to refuse conversation "provides ample protection for the unwilling listener"). In *Rowan,* the Court reviewed a statute under which a person could require a

mailer of material that he deemed to be "erotically arousing or sexually provocative" to remove his name from its mailing lists and stop all future mailings to the householder. 397 U.S. at 729-30, 90 S.Ct. 1484 (internal quotation marks omitted). The Court rejected the argument that the statute violated the mailers' right to communicate, concluding that such a right could be limited "by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." *Id.* at 737, 90 S.Ct. 1484. In *Playboy,* the Court explicitly endorsed the practice of "targeted blocking," whereby unwanted channels could be blocked on a household-by-household basis. 529 U.S. at 815, 120 S.Ct. 1878. The Court deemed this to be a less restrictive alternative to banning, though still a feasible and effective means of furthering the Government interest in shielding children from sexually-oriented programming. *Id.* In *NYSAR,* this Court, in invalidating a broader prohibition on real estate solicitations, characterized the cease-and-desist registry as a "type of narrower, resident activated measure," that was reasonably tailored, yet still effective. 27 F.3d at 844.

The District Court, however, concluded that because the regulation covered only real estate solicitations, it was not a reasonable fit with the interest in homeowners' privacy. The Court deemed the regulation fatally underinclusive for not proscribing solicitation by other categories of solicitors. However, in the commercial speech context, the Supreme Court has made clear that underinclusiveness will not necessarily defeat a claim that a state interest has been materially advanced, *see Posadas,* 478 U.S. at 342-43, 106 S.Ct. 2968; *Metromedia,* 453 U.S. at 511, 101 S.Ct. 2882. As the Court noted, a state is not required to "make progress on every front before it can make progress on any front." *Edge Broadcasting,* 509 U.S. at 434, 113 S.Ct. 2696.

In *Florida Bar,* for example, where the Florida Bar asserted substantial interests in protecting the privacy of

victims against intrusive contact by lawyers and in protecting the reputation of Florida lawyers, *see* 515 U.S. at 624-25, 115 S.Ct. 2371, the Court upheld the 30-day restriction on direct-mail solicitations of victims despite objections that the privacy invasions and the harm to the reputation of the profession were also consequences of other kinds of attorney advertising and solicitation, *see id.* at 640-41, 115 S.Ct. 2371 (Kennedy, J., dissenting). In concluding that the restriction on "pure commercial advertising" was constitutional, the Court noted that, particularly where the standards and conduct of professionals have traditionally been subject to extensive regulation by the States, "it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the subordinate position of commercial speech in the scale of First Amendment values." *Id.* at 635, 115 S.Ct. 2371 (internal quotation marks and citations omitted). Similarly, in rejecting challenges to a municipal ordinance prohibiting the use of commercial signs on residential property, this Court concluded that the governmental interests in aesthetics and safety were directly advanced by the ordinance, despite arguable objections that the prohibition was underinclusive with respect to those goals. *See Long Island Board of Realtors,* 277 F.3d at 627-28.

Supreme Court decisions that have invalidated commercial speech restrictions for lack of a reasonable "fit" reflect concerns not implicated by the cease-and-desist zones. In *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995), the regulatory scheme was defective by reason of its "overall irrationality," *id.* at 488, 115 S.Ct. 1585, and in *Greater New Orleans Broadcasting,* the scheme was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it," 527 U.S. at 190, 119 S.Ct. 1923. Neither criticism applies to the regulations establishing cease-and-desist zones. In *Discovery Network,* the Court invalidated a ban on newsracks distributing

commercial handbills but not those distributing newspapers because the benefit in safety and aesthetics was "minimal" compared to the total number of newsracks on the public right of way, 507 U.S. at 418, 113 S.Ct. 1505, and because the distinction between commercial and noncommercial speech bore "no relationship *whatsoever*" to the interests asserted, *id.* at 424, 113 S.Ct. 1505. Here, however, the cease-and-desist zones have been identified because of the high volume of citizen complaints about real estate solicitations sent to homes, the restriction applies only to those seeking insulation from such solicitations, and the Plaintiffs' objection relies on the distinction *among* categories of commercial solicitations, not between commercial and noncommercial solicitations.

In distinguishing between real estate solicitation and other kinds of commercial solicitation, the challenged scheme is more analogous to *Metromedia* than to *Discovery Network.* In *Metromedia,* the Court found the distinction between onsite and offsite commercial advertising on the same property justifiable, although the two might be equally distracting and unattractive, because "the city may believe that offsite advertising . . . presents a more acute problem than does onsite advertising." 453 U.S. at 511, 101 S.Ct. 2882; *see also Posadas,* 478 U.S. at 342-43, 106 S.Ct. 2968 (evidence supported distinction between casino gambling and other games of chance); *cf. Pearson v. Edgar,* 153 F.3d 397, 404 (7th Cir.1998) ("The district court found as a fact that the state produced 'no evidence in this case that real estate solicitation harms or threatens to harm residential privacy.'") (quoting *Pearson v. Edgar,* 965 F.Supp. 1104, 1108-09 (N.D.Ill.1997)). New York's system of identifying zones in which real estate solicitations are voluminous and permitting homeowners in these zones to elect not to receive such solicitations at their homes has a reasonable "fit" with the governmental interest in protecting privacy, and the record supports the use of that system in the zones at issue in this case.

To the extent that some commercial speech restrictions are vulnerable out of concerns about paternalism,[6] the challenged restriction entirely avoids such concerns because it applies only where homeowners elect to seek its protection.

Construing the evidence in the light most favorable to the Plaintiffs, we conclude that there is no genuine issue of material fact. The Secretary has produced evidence of harassing residential real estate solicitations, and the only issue raised by the Plaintiffs is whether this record is sufficient to sustain the regulation. We consider the record sufficient, and conclude that on their face subsection 442-h(3) and the regulations promulgated pursuant to that statute do not violate the First Amendment rights of the Plaintiffs.

The statute also does not violate the Equal Protection Clause. "Insofar as the [statute] does not violate the First Amendment, its definitions and distinctions need only be rationally related to legitimate governmental interests." *General Media Communications, Inc. v. Cohen,* 131 F.3d 273, 276 (2d Cir.1997). Where the plaintiffs have failed to show a violation of the First Amendment, strict scrutiny is inapplicable, and the statute is evaluated under rational basis review. *See Fighting Finest, Inc. v. Bratton,* 95 F.3d 224, 231 (2d Cir.1996). As already discussed, the Secretary has shown

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[6] *See, e.g., Western States Medical Center,* — U.S. at —, 122 S.Ct. at 1507 ("We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."); *Coors Brewing,* 514 U.S. at 497, 115 S.Ct. 1585 (Stevens, J., concurring in judgment) ("[T]he Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good."). *But see 44 Liquormart,* 517 U.S. at 517, 116 S.Ct. 1495 (Scalia, J., concurring in part and in judgment) ("[I]t would also be paternalism for us to prevent the people of the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them.").

a legitimate reason for targeting real estate licensees. *See also Posadas,* 478 U.S. at 344 n. 9, 106 S.Ct. 2968 ("If there is a sufficient 'fit' between the legislature's means and ends to satisfy the concerns of the First Amendment, the same 'fit' is surely adequate under the applicable 'rational basis' equal protection analysis.").

Conclusion

Accordingly, the statute on its face and as applied is constitutional, and the regulations promulgated thereunder do not violate the First Amendment rights of the Plaintiffs. The judgment of the District Court is therefore reversed, and the case is remanded with directions to enter judgment for the Secretary.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Filed June 29, 2001]

CV 99-1038 (TCP)

PATRICIA ANDERSON, MICHAEL A. HOSEIN and STEPHEN E. PARKER,

Plaintiffs,

-against-

ALEXANDER F. TREADWELL, as Secretary of State of the State of New York,

Defendant.

JUDGMENT

A Memorandum and Order of Hon. Thomas C. Platt, United States District Judge, having been filed on June 20, 2001, granting the plaintiffs PATRICIA ANDERSON, MICHAEL A. HOSEIN, and STEPHEN E. PARKER'S motion for summary judgment, declaring that NYRPL 442-h(3), as amended, and all regulations with respect thereto, to establish or enforce so-called cease-and-desist zones and restrictions are unconstitutional; and denying defendant ALEXANDER F. TREADWELL, as Secretary of State of the State of New York's cross-motion motion for summary judgment to declare that the cease-and-desist orders so applied, and NYRPL 442-h(3), as amended, are constitutional, it is

ORDERED AND ADJUDGED that NYRPL 442-h(3), as amended is unconstitutional.

Dated:
Central Islip, New York
June 29, 2001

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/ Joseph Di Talia
JOSEPH DI TALIA
Deputy Clerk-In-Charge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

99-CV-1038 (TCP/MLO)

PATRICIA ANDERSON, MICHAEL A. HOSEIN and STEPHEN E. PARKER,

Plaintiffs,

-against-

ALEXANDER F. TREADWELL, as Secretary of State of the State of New York,

Defendant.

MEMORANDUM AND ORDER

PLATT, District Judge,

Plaintiffs Anderson, Hosein, and Parker move for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, seeking a judgment declaring that, on its face, and as applied, Section 442-h(3) of the Real Property Law of the State of New York, as now amended, and all regulations with respect thereto, to establish or enforce so-called cease-and-desist zones and restrictions are unconstitutional and otherwise invalid. Defendant cross-moves for Summary Judgment seeking a judgment declaring that the cease-and-desist orders as applied, and NYRPL 442-h(3) as now amended, are constitutional. Plaintiffs' motion must be and the same hereby is GRANTED. Defendant's motion must be and the same hereby is DENIED.

BACKGROUND

In 1989, the New York State legislature enacted NYRPL 442-h(3) in response to repeated complaints from home-owners about real estate solicitation. This statute created

cease-and-desist zones whereby homeowners located within such a zone could place their names on a state registry precluding realtors from soliciting to any homeowner listed in the state registry. Cease-and-desist zones are content-based prohibitions, which include a ban on truthful and non-misleading statements of a broker's licensee status as well as his willingness to furnish professional services. Plaintiffs are real estate licensees who are subject to cease-and-desist restrictions in certain areas of New York which have been designated as cease-and-desist zones. Plaintiffs Anderson and Hosein have been prosecuted by the defendant for a cease-and-desist violation for sending a flyer to an address included in defendant's cease-and-desist list for Queens County. All parties agree this flyer would be legal in other parts of New York which are not in cease-and-desist zones.

Plaintiff Parker is a new real estate licensee who alleges he has had particular difficulties in developing his business due to the cease-and-desist zones and restrictions. All plaintiffs are affiliated with firms that are or until recently were franchises of national real estate franchise companies, which provide so-called "farming tools" which are customer solicitation materials such as flyers and door hangers. Halmike Realty, the firm with which Plaintiffs Anderson and Hosein are affiliated, alleges it has surrendered its Coldwell Banker franchise because the cease-and-desist restrictions prohibit effective use of the solicitation materials which are customarily used by real estate licensees. Furthermore, plaintiffs allege that the solicitation of listings is critical to the success of a real estate licensee, and there is no cost-effective alternative to communicating truthful, non-deceptive information about the real-estate market, the licensee, the licensee's company, and the nature of their services. Plaintiffs allege these cease-and-desist zones impede their First Amendment rights under the Constitution and brought this action on February 23, 1999.

SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, a court may grant summary judgment if it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party seeking summary judgment bears the burden of demonstrating that no genuine factual dispute exists. *See Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 36 (2d Cir. 1994).

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citation omitted). Instead, the non-moving party must show that a disputed material fact exists in light of the substantive law by offering "concrete evidence from which a reasonable juror could return a verdict in [its] favor." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 114 (2d Cir. 1988) (*quoting Anderson*, 477 U.S. at 256).

DISCUSSION

"Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 809 (2000). In *Playboy*, the Supreme Court held that content-based regulations of speech could only stand if they can meet a strict scrutiny standard, whereby, the statute must be narrowly tailored, and if a less restrictive alterative means is available for the government to achieve its goals, the government must use it. *See id.* at 815.

The Supreme Court in *Playboy* held unconstitutional a statute that required cable operators to scramble channels primarily dedicated to sexually oriented programming, or

limit viewing of such channels to certain times of the day. The Supreme Court held that the less restrictive content-neutral mechanisms of allowing homeowners the ability to block any channel they did not wish to receive could instead be employed to meet the same goals.

In the instant case, the NYRPL 442-h(3) "cease-and-desist" regulations are predicated on the carriers of particular speech, specifically those individuals who solicit properties for sale or for profit, state licensed realtors and non-licensees alike. As such, this statute is not content-neutral. Thus, when furtherance of the statute's proscribed goals can be accomplished through less restrictive means they must be. *See Playboy* at 815.

Defendant contends that the statute advances a substantial governmental interest by protecting homeowners' right to privacy, stating that many homeowners feel "harassed, overwhelmed, threatened, and offended by the extensive telephonic, mail, flyers, and personal direct solicitation they receive." Defendant alleges this statute provides a solution to this purported problem. In support of this position, defendant states that ample documentation is available to support a finding that solicitation by realtors is a major cause of homeowner harassment and the ability to prevent realtors from communicating with homeowners will relieve such alleged harassment.

However, in light of *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York* and *Playboy*, such alleged privacy interests must not be furthered by any chosen regulatory scheme, but rather one whose remedy is "reasonably fit" with the problem it seeks to address. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980) *See also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000). To be a "reasonable fit," a regulatory scheme must not merely make paltry gains in furtherance of a State interest, but must

directly further such interest, and be no more extensive than is necessary in serving the State interest. *See City of Cincinnati v. Discovery Network*, 507 U.S. 441 (1993).

In *City of Cincinnati v. Discovery Network* a regulatory statute was held unconstitutional for it lacked a "reasonable fit" between the city's interest and the means chosen to serve that interest. *See City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). In this case, the Supreme Court found that a statutory ban on the distribution of "commercial handbills" via newsracks did not "reasonably fit" its purported goal of "safety and esthetics." The statute's constitutional failure was the result of its underinclusiveness; that is, the goal of increased "safety and esthetics" was not served by a statute whose scope was too narrow for it failed to address other sources of the alleged "safety and esthetics" problems such as newspaper racks.

Although the city argued that any decrease in the number of newsracks inversely affected safety and esthetics (thus advancing the State interest), the Supreme Court considered such reasoning "an insufficient justification . . . for the discrimination against respondent's use of newsracks are no more harmful than the permitted newsracks." *Id.* at 418. The continuing availability of newsracks for newspapers, where they too are equally hazardous and esthetically displeasing as commercial handbills, rendered the statute underinclusive, for it could not directly advance the interest of "safety and esthetics" in failing to include non-commercial newsracks that affect safety and esthetics in an identical way.

In the instant case, the underinclusive nature of the anti-solicitation statute is unreasonably fit with its alleged interest of homeowner privacy. NYRPL 442(h)3 solely proscribes solicitation by licensed real estate brokers but not other classes of individuals who may use the same medium to transmit different messages. Though privacy may indeed be affected by real estate solicitation, and the interest advanced

by the statute may be compelling, defendant has not made a showing that solicitation by realtors causes greater harm to homeowners' privacy interests than do other forms of commercial speech that broadcast through like media sources.

In short, NYRPL 442-h(3) is underinclusive since it does not proscribe solicitation by other classes of solicitors, e.g., stock brokers, insurance brokers, etc., groups who also solicit homeowners thereby infringing upon their privacy.

In *Board of Trustees of the State Univ. of New York v. Fox*, the Supreme Court stated that it must be shown how a statute is "narrowly tailored to achieve the desired objective." *Board Of Trustees of the State Univ. of New York v. Fox,* 492 U.S. 469, 480 (1989). Accordingly, since other commercial industries could continue to do what realtors are prohibited from doing—soliciting homeowners—it remains unclear how a statute proscribing solicitation by realtors only would accomplish the desired objective of safeguarding homeowner privacy.

"Where a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy* at 816. Safeguarding residential privacy can be attained alternatively by limiting the method of dissemination one chooses rather than the content of the solicitation. Examples of such content-neutral alternatives include the No Telemarketing Sales Call Statewide Registry which applies to all telemarketers. N.Y. Gen. Bus. Law ch. 547 § 399-z (providing homeowners with the opportunity to place their names on a statewide "do-not-call" list that bars all telemarketers from making contact with them). Federal legislation also imposes similar regulations which apply to all speakers regardless of the content of their communication. See Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102. Though these statutes target only telephonic communications, other forms of

solicitous communications can similarly be addressed by content-neutral legislation.

Defendants have failed to show how such alternatives would be ineffective. In fact, such content-neutral approaches would prove more effective in more broadly addressing the privacy concerns without unduly burdening any particular industry based on the content of its speech. Individuals would be able to reject any commercial solicitations by regulating the medium through which the speech arrives at one's door, without regulating the specific content of individual speech.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for Summary Judgment seeking a declaration that NYRPL 442-h(3), as amended, is unconstitutional, must be and the same hereby is GRANTED; defendant's motion seeking a declaration that NYRPL 442-h(3), as amended, is constitutional, must be and the same hereby is DENIED.

SO ORDERED.

/s/ Thomas C. Platt,
THOMAS C. PLATT, U.S.D.J.

Dated: Central Islip, New York
June 20, 2001